SINGAPORE REPORTS

See Bee Hoon v Quah Poe Hoe & Anor

HIGH COURT (SINGAPORE) – SUIT NO 743 OF 1987
THEAN J
31 MAY 1989

Land Law – Completion – Requirement that vendor performed certain acts before completion – Whether purchaser entitled to impose requirements – Effect of bankruptcy notice not served on vendor on completion – 'Default' in condition 8 of Law Society's Conditions of Sale 1981 – Rules of the Supreme Court 1970, O 81 – Bankruptcy Act (Cap 20, 1985 Ed), ss 52 & 54 – Property Tax Act (Cap 254, 1985 Ed)

Bankruptcy – Effect of bankruptcy notice issued but not served on debtor on transactions of debtor

Words and Phrases – 'Default' – Law Society's Conditions of Sale 1981, cond 8

The defendants offered in writing to sell to the plaintiff a piece of property ('the property'). The offer was accepted by the plaintiff, and in accordance with the offer terms, a sum of money was duly paid to the solicitors of the defendants as stakeholders. A valid and binding agreement for the sale and purchase of the property was thus made ('the contract'). The contract incorporated the Law Society's Conditions of Sale 1981 ('the Conditions'). The property was at this time mortgaged to a bank and was subject to a charge in favour of the Central Provident Fund Board ('CPF'). As the defendants were unable to complete the transfer of the property on the date fixed, the plaintiff was let into possession of the property in order to mitigate the damages payable by the defendants. The plaintiff then took out a writ against the defendants claiming specific performance and damages. After service of the writ on the defendants, the plaintiff sought an order under O 81 of the Rules of the Supreme Court for specific performance, and an interlocutory judgment against the defendants for damages, in lieu of or in addition to specific performance. The assistant registrar subsequently made an order for specific performance and for interlocutory judgment with damages to be assessed. Completion, however, was not carried out for several months due to various difficulties, one of which was the issue of a bankruptcy notice against the first defendant. The question of assessment of damages finally came before the assistant registrar who, accepting the plaintiff's computation of damages, using cond 8 of the Conditions, awarded the plaintiff $10,492.65 and costs. The defendants appealed against this order.

Held, allowing the appeal:

(1) The entire case turns on the construction of cond 8(b) and (c) of the Conditions.

(2) The evidence showed that besides the bankruptcy notice against the first defendant, the other difficulties preventing completion were the requirements by the plaintiff that the defendants' solicitors should confirm that the defendants were able to discharge the existing loans on the property and that documentary evidence from bank C and the CPF would be produced showing that they would give total discharges of the property.

(3) The contract transaction was made bona fide and at arm's length and for valuable consideration. There was therefore no question of the transaction being avoided under any provisions of the Bankruptcy Act. As at the planned date of completion, no bankruptcy notice had been served on the first defendant and, accordingly, no available act of bankruptcy had been committed by him.

(4) The plaintiff's requirement regarding the discharge of the property was unjustified. All the plaintiff should be concerned with is whether at the time of completion, the defendants were able to deliver total discharges by the secured creditors. If the discharges were not available or not satisfactory, then the plaintiff would be entitled to refuse to complete.

(5) As regards the failure of the defendants to produce the documents required at completion for inspection before completion, this should not prevent completion from taking place. If at the time of completion, these were not produced, then the plaintiff could refuse to complete.

(6) The plaintiff's calculation of damages was also incorrect since the plaintiff's entitlement to damages was based on cond 8(b) as possession of the property had been given to the plaintiff. The amount of interest had to be abated by an amount equivalent to the rent calculated on the basis of the annual value of the property as determined under the Property Tax Act.

(7) Therefore, the plaintiff's requirements before agreeing to completion, to a large measure contributed to the delay in completing the transaction beyond 31 July 1987.

(8) Under cond 24 of the Conditions, the conveyance and assignment of the property was to be prepared by the plaintiff's solicitors. This instrument, although prepared, was never engrossed and forwarded to the defendants' solicitors for execution by the defendants in readiness for the completion. This small but significant step showed that the plaintiff was not ready to complete on 31 July 1987.

(9) Since the plaintiff had not accepted the repudiation of the contract by the defendants and had obtained an order for specific performance, she was not entitled to retain the deposit paid by her to the defendants and later refunded to her. The money should be returned to the defendants' solicitors to be held by them as stakeholders.

(10) The word 'default' in cond 8 of the Conditions meant not doing what ought to have been done or doing what ought not to have been done. In other words, it involves a breach of duty owed to another. The duties of each party must be determined by all the circumstances, including the nature of the contract and its provisions.

(11) The plaintiff's solicitors were labouring under an erroneous view of the law of bankruptcy and in imposing unsustainable requirements for completionn to occur. The plaintiff was therefore in default.

(12) Both the plaintiff and the defendants had to share the blame for the failure to complete on 31 July 1987, and under cond 8(c), the plaintiff is therefore not entitled to interest by way of liquidated damages.

Cases referred to

1 *In re Bayley-Worthington and Cohen's Contracts* [1909] 1 Ch 648 (folld)
2 *Toh Teck Sun* v *Mandarin Gardens Pte Ltd* [1988] 2 MLJ 276 (folld)

Legislation referred to
Bankruptcy Act (Cap 20, 1985 Ed) ss 52, 54
Property Tax Act (Cap 254, 1985 Ed)
Rules of the Supreme Court 1970 O 81

Shriniwas Rai for the plaintiff.
Leslie Netto for the defendants.

Cur Adv Vult

Thean J: The facts in this case are not in dispute. On 21 August 1986 the defendants offered in writing to sell to the plaintiff the property known as 56, Holland Road, Dragon Court, Singapore 1025, at the price of $223,500 on terms and conditions therein setforth. A sum of $5,000 was paid to the defendants as consideration for the offer which was kept open for acceptance until 29 August 1986. The offer was duly accepted by the plaintiffs on 27 August 1986, and in accordance with the terms thereof a sum of $17,350 was paid to the solicitors for the defendants to be held by them as stakeholders; thus, a valid and binding agreement ('the agreement') for the sale and purchase of the property was made between the defendants and the plaintiff on that date. The agreement is simple and straightforward and incorporates 'The Singapore Law Society's Conditions of Sale 1981' ('Law Society's Condition of Sale'), and under cl 6 of the terms of sale, the purchase was to be completed at the office of the solicitors for the defendants on or before 20 October 1986.

At the material time the property was mortgaged to Citibank NA ('Citibank') and was subject to a charge in favour of Central Provident Fund Board ('CPF') to secure the amounts owing to them respectively. On the date of completion, as fixed by the agreement, the defendants found they did not have sufficient funds (together with the purchase moneys) to redeem the property from Citibank and CPF and were therefore unable to complete the sale of the property. On 21 October 1986 the defendants' solicitors telexed to the plaintiff's solicitors informing the latter of this fact and intimating that the defendants would like to meet the plaintiff 'to work out the damage' the plaintiff had sustained and, in mitigation of damages, offered to allow the plaintiff to occupy the property, free of rent, until she found alternative accommodation, subject to a maximum period of six months. Apparently, pursuant to this offer, possession of the property was given to the plaintiff on 31 October 1986. The defendants did meet the plaintiff on 5 November 1986 at the latter's solicitors' office, but nothing appeared to have been worked out between the parties in terms of damages or otherwise. The defendants' solicitors subsequently on 26 November 1986 in a letter to the plaintiff's solicitors reiterated that the defendants were unable to complete the sale of the property and requested for the return of the title deeds previously forwarded to the plaintiff's solicitors. This was soon followed by a further letter from the defendants' solicitors dated 9 December 1986 by which they returned the sum of $17,350, which they had held as stakeholders, plus interest accrued. That letter intimated that the defendants would also refund to the plaintiff the sum of $5,000 (which was the consideration for the offer) together with interest and that they, the defendants, had 'no intention of selling the property to anyone else'. It seems to me that the defendants had thereby repudiated the agreement; but the plaintiff did not appear to have accepted such repudiation, though, strangely enough, the plaintiff's solicitors on 5 March 1987 demanded from the defendants' solicitors the refund of the sum of $5,000. That sum, however, was never refunded to the plaintiff.

The next event that took place was on 13 March 1987 when the plaintiff took out a writ against the defendants claiming for specific performance of the agreement, damages and refund of the $5,000 with interest and other reliefs. After the writ had been served on the defendants, the plaintiff took out an application under O 81 of the Rules of Supreme Court seeking an order for specific performance of the agreement, interlocutory judgment against the defendants for damages in lieu of or in addition to specific performance and costs. On 22 May 1987, the application was heard before the assistant registrar who made an order for specific performance of the agreement and for interlocutory judgment to be entered against the defendants with damages to be assessed for breach of contract in lieu of or in addition to specific performance and for costs. After the order was obtained, the plaintiff's solicitors on 29 June 1987 wrote to the defendants' solicitors requiring the defendants to complete the sale within 14 days and requesting for a completion account and certain documents. In response, the defendants' solicitors on 7 July 1987 by telex suggested that the completion be scheduled to take place on 31 July 1987. Subsequently, exchanges of correspondence by telexes or letters took place between the defendants' solicitors and the plaintiff's solicitors, in which various difficulties were raised by the latter which appeared to have impeded the completion taking place on 31 July 1987 as fixed by the defendants' solicitors. I shall deal with these difficulties shortly, but for the moment it is sufficient to mention that one of them was the issue of a bankruptcy notice by one Cheang Wai Yew against the first defendant. No completion took place on 31 July 1987.

Thereafter ensued a period of about four and a half months in which neither of the parties appeared to have communicated with the other. Certainly there was no exchange of correspondence between the two firms of solicitors with regard to completing the sale and purchase of the property. Then on 18 December 1987, the plaintiff's solicitors resurrected the matter by their telex to the defendants' solicitors. Again, further exchanges of cor-

respondence took place between the two firms of solicitors, which continued for about two and a half months, and, eventually, only on 16 March 1988 was the sale and purchase completed. On 5 October 1988 the question of assessment of damages came on for hearing before the assistant registrar. Before him, no viva voce evidence was given and the parties relied wholly on two bundles of documents produced before him. Both the bundles were agreed. They consisted mainly of correspondence – mostly telexes – passing between the plaintiff's solicitors and the defendants' solicitors. The plaintiff relied on cond 8 of the Law Society's Conditions of Sale and computed the amount of damages in the sum of $10,492.65. At the conclusion of the hearing, the assistant registrar accepted the computation submitted on behalf of the plaintiff, and awarded to the plaintiff damages in the sum of $10,492.65 and costs. Against that order, this appeal is now brought.

Before me, as it was before the assistant registrar, the plaintiff's entitlement to damages is founded solely on cond 8 of the Law Society's Conditions of Sale and is disputed by the defendants also on the basis of that condition. It is therefore convenient at this stage to set out cond 8 which is as follows:

> If the sale shall not have been completed on or before the date fixed for completion, then
>
> (a) If the delay in completion is attributable solely to the default of the purchaser, he shall pay interest on the amount of the purchase price (less the deposit and any sum paid to account) at the rate of 10% per annum from and including the date fixed for completion until the date of actual completion of the sale.
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> (b) If the delay in completion is attributable solely to the default of the vendor, he shall pay to the purchaser by way of liquidated damages interest at the rate of 10% per annum on the purchase price of the property from and including the date fixed for completion until the day of actual completion: Provided that if possession of the property sold has been delivered by the vendor to the purchaser before the date of actual completion then such damages shall be abated by a sum equal to the rent received by the purchaser or in case the property is delivered with vacant possession by the equivalent of a rent calculated on the annual value of the property fixed under the Property Tax Act.
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> (c) If the delay in completion is attributable to some cause other than the default of the vendor or the purchaser or to the default of both the vendor and the purchaser, no interest or damages shall be payable.

It is the contention of counsel for the plaintiff that the delay in completing the sale and purchase was attributable solely to the default of the defendants, and therefore they were obliged to pay to the plaintiff by way of liquidated damages interest at the rate of 10% per annum on the purchase price of the property from the date fixed for completion (inclusive of that date) until the day of actual completion less a sum equivalent to the amount of rent calculated on the annual value of the property as determined under the Property Tax Act. Counsel for the defendants accepted that up to 31 July 1987 the delay in completing the transaction was attributable solely to the default of the defendants. However, he argued that for the period thereafter the delay was not attributable solely to the default of the defendants; it was attributable in part to the default of the plaintiff. Accordingly, under para (c) of cond 8, for the period after 31 July 1987, no interest by way of liquidated damages should be awarded to the plaintiff. The issue is one of fact and also turns on the true construction of paras (b) and (c) of cond 8, and, in particular, the term 'default' therein.

As the defendants accepted that the period of delay up to 31 July 1987 was attributable solely to their default, it is only necessary to examine the relevant correspondence passing between the plaintiff's solicitors and the defendants' solicitors from July onwards to determine whether the subsequent period of delay was attributable solely to the default of the defendants or to some cause other than the default of the defendants or the plaintiff or to the default of both of them. For this purpose, the letter of 29 June 1987 written by the plaintiff's solicitors to the defendants' solicitors is a convenient starting point; that was the first written communication relating to the completion of the transaction after the order was obtained by the plaintiff. By that letter the plaintiff's solicitors informed the defendants that the plaintiff was ready to complete the transaction, gave to the defendants notice to complete it within 14 days thenceforward and requested for a completion account and delivery of certain documents. The defendants' solicitors replied by a telex of 7 July 1987 in which they suggested that 31 July 1987 be scheduled as the date for completing the transaction. In response, the plaintiff's solicitors by telex requested for a list of documents, some of which were supplied by the defendants' solicitors on 21 July 1987. Then, on 23 July, the plaintiff's solicitors despatched the following urgent telex to the defendants' solicitors:

> We refer to yr ltr DD 21/7/87 upon which we hv taken o clt's instructions.
>
> From o latest bankruptcy search made on 20/7/87, we understand that fresh bankruptcy notice has been filed against yr clt, Mr Quah Poe Hoe for the amount of $205,509.73 owing to the creditors, named Cheang Wai Yew who is represented by M/s Joseph Hoo Morris N Kumar. In view of this bankruptcy proceeding, kindly let us know what proposal u hv to resolve the matter.
>
> Pls note that yr clts hv all along been the defaulting party in the sale of the above property to o clt, even until to-date, u hv failed to render us the completion a/c despite o several requests for it. We are of the opinion that the bal of 10% deposit can be settled on completion of the sale n this should be reflected in the compln a/c.
>
> Meanwhile, could u confirm as to whether yr clts are able to discharge the existing loan owing to Citibank NA. Pls let us know the amount of outstanding loan together with interest owed to-date to the said bank.

The defendants' solicitors replied to this telex on 24 July 1987; but they did not deal with the question of the bankruptcy notice and the discharge of the loan owing to Citibank; they were more concerned with pressing the plaintiff's solicitors for the return of the deposit which the plaintiff was obliged to pay under the agreement. The plaintiff's solicitors on the same day telexed to the defendants' solicitors enquiring again the bankruptcy proceedings taken against the first defendant and concluded as follows:

> In view of the said bankruptcy proceeding taken agst yr clt, we are instructed to obtain from u documentary evidence from the existing mortgagee Citibank NA n CPF Board to show that yr clts are able to complete the sale of the property to o clt on or before 31 July '87 which date was unilaterally fixed by u.

On 28 July 1987 the defendants' solicitors despatched to the plaintiff's solicitors a lengthy telex in which they dealt with the following: (i) they complained of the failure by the plaintiff to return to them the deposit and considered that as a breach of contract; (ii) they said that the defendants would be ready to complete the sale 'on or about 31 July 1987' and set out a completion account; (iii) they requested for two cashier's orders each for a specific amount to be made out in favour of the CPF and Citibank respectively; and (iv) as for the bankruptcy notice they said that it did not affect the sale as all the proceeds of sale would be paid to Citibank and CPF who were the 'preferred creditors'. The plaintiff's solicitors did not agree; on 31 July 1987 they responded by the following lengthy telex which I propose to set out in full:

> We refer to your telexes DD 28/7/87 n 29/7/87.
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> We disagree with your view as stated in para 6 of yr telex dated 28/7/87. In view of the latest bankruptcy notice filed agst yr clt, we would like to seek yr written confirmation as to whether yr clt has committed an act of bankruptcy to-date, and, if so, yr clt is incapacitated to complete the sale and execute the conveyance n assignment of the property in favour of o clt.
>
> In order to avoid any legal complications arising out of the said bankruptcy proceedings taken agst yr clt, we would suggest that yr clt negotiates immediately with the creditor named, Cheang Wai Yew n withdraw the bankruptcy notice before we fix a date for completion of the sale and purchase of the property herein.
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> We understand from yr clt's existing mortgagee's solicitors that the sale price of $223,500 is insufficient to cover the existing mortgage debt of both CPF board n the mortgagee. Kindly let us know the actual amount of shortage which yr clts have to pay from their own funds n also whether u would retain this amt as stakeholders until completion of the sale of the property.
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> Meanwhile, in order to avoid any further delay on the matter, we would suggest that u quickly send us a copy of the letter of confirmation from yr clts' existing mortgagee confirming that they agree to give a total discharge of the property on or before completion of the sale and purchase of the property herein.
>
> In this regard, we have requested for a copy of the duly approved reconveyance and reassignment in respect of the mortgage (regd in vol 2331 n 121) but u have not sent to us to-date.
>
> As regards the question of interest for late completion, your clients have to bear the total amount and which would be reflected in yr account:

Bal of yr compln a/c as per yr telex VC dd 29/7/87	$214,866.77
Less:	
Int for late completion from 12/11/87 to 31/7/87 (262 days) on $223,500 at 10% per annum at 61.23 per day	$ 16,042.24
	$198,824.51

No completion of the sale and purchase took place on 31 July 1987 as fixed by the defendants' solicitors or, for that matter, soon thereafter.

As I have said, thereafter, there was a period of silence lasting for about four and a half months and the matter only came to life again with the telex of 18 December 1987 from the plaintiff's solicitors to the defendants' solicitors. By that telex the plaintiff's solicitors said that from their 'latest search in the High Court' the bankruptcy notice filed against the first defendant had been served on him and that he had committed an act of bankruptcy and therefore the defendants were not able or ready to complete the sale. That statement of fact was not correct, as a search at the registry of the High Court would have revealed the contrary: that the bankruptcy notice had not been served; in fact from my perusal of the documents in the file there was no evidence or record of any service. Thenceforth, further exchanges of correspondence took place between the two firms of solicitors. The plaintiff's solicitors still required information of the extent of the defendants' indebtedness to Citibank and CPF; such information was eventually furnished. Then on 25 February 1988 the plaintiff's solicitors wrote to the defendants' solicitors stating, among other things, that they gave the defendants up to 8 March 1988 to complete the transaction and requested for a completion account and certain documents. By that letter also, the plaintiff's solicitors forwarded the engrossed conveyance and assignment for execution by the defendants. In response, the defendants' solicitors furnished some of the documents and a completion account arising from which there was some dispute as to the precise amount, which, however, was subsequently resolved. The parties finally completed the transaction on 16 March 1988.

From my examination of these telexes and letters it appears that the following difficulties prevented the parties from completing the sale and purchase of the property on 31 July 1987:

(a) the bankruptcy notice taken out by Cheang Wai Yew against the first defendant;
(b) the requirement of the plaintiff's solicitors that the defendants' solicitors confirm that the defendants were able to discharge the existing loans owing to Citibank and CPF and produce documentary evidence from Citibank and CPF that they would give total discharges of the property on or before completion;
(c) the requirement of the plaintiff's solicitors that the defendants' solicitors furnish the 'relevant documents' as specified in the former's telex of 8 July 1987; and
(d) the requirement of the plaintiff's solicitors that the defendants pay interest for the late completion amounting to $16,042.24.

I now turn to consider each of these matters seriatim. It is common ground that on 8 July 1987 a bankruptcy notice was taken out by Cheang Wai Yew against the first defendant. What was in dispute is the effect of this bankruptcy notice. To the plaintiff's solicitors, that was definitely an impediment to the completion of the sale taking place. The defendants' solicitors, however, thought otherwise; they maintained that the bankruptcy notice did not affect the sale, as all the proceeds of sale were to be paid to the Citibank and CPF. It seems to me that both of them were in error. The relevant provision of the Bankruptcy Act (Cap 20, 1985 Ed) applicable is s 54 which is as follows:

> Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of a bankruptcy –
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> (a) any payment by the bankrupt to any of his creditors;
> (b) any payment or delivery to the bankrupt;
> (c) any conveyance or assignment by the bankrupt for valuable consideration; or
> (d) any contract, dealing or transaction by or with the bankrupt for valuable consideration,
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> provided that both the following conditions are complied with:
>
> (i) the payment, delivery, conveyance, assignment, contract, dealing or transaction, as the case may be, takes place before the date of the receiving order; and
> (ii) the person other than the debtor to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing or transaction was made, executed or entered into has not, at the time of the payment, delivery, conveyance, assignment, contract, dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

The transaction was made bona fide and at arm's length and for valuable consideration. It was not a voluntary settlement under s 52; nor was it a preferential conveyance or transfer of property or payment under s 53. Therefore, there was no question of the transaction being avoided under these provisions or any other provisions preceding s 54, and if the completion took place on 31 July 1987 the conveyance and assignment executed and delivered by the defendants would fall squarely within para (c) of s 54; and the only relevant question was whether the two conditions set out in the proviso to s 54 had been complied with. As at 31 July 1987, though a bankruptcy notice had been issued against the first defendant, it had not been served on him – in fact it had never been served on him at all – and, accordingly, no available act of bankruptcy had been committed by him. I accept that as the plaintiff's solicitors had knowledge of the bankruptcy notice they were put on enquiry. They could carry out a quick search at the registry of the High Court and would be able to satisfy themselves whether or not the bankruptcy notice had been served on the first defendant as at 31 July 1987. They could also make an enquiry of this fact with the solicitors acting for Cheang Wai Yew, since they knew who were acting for him. In both or either of the events they would or could have found out that no act of bankruptcy had been committed by the first defendant – certainly not as at 31 July 1987. The defendant's solicitors on their part could have confirmed this fact (as requested) to the plaintiffs' solicitors without any difficulty. Hence, if the sale were completed on 31 July 1987, both the conditions in para (i) and (ii) of the proviso to s 54 would have been complied with and the conveyance and assignment of the property to the plaintiff could not be avoided or invalidated by any subsequent act of bankruptcy of the first defendant. Both the plaintiff's solicitors and the defendants' solicitors did not appear to me to have truly appreciated the operation of that section. If they had, they would have come to the obvious conclusion that as the first defendant had not committed an act of bankruptcy, the completion of the sale and purchase of the property could safely proceed.

I now turn to the second difficulty in the way of the completion; on this, I find that the stand taken by the plaintiff's solicitors was unjustified. It is no concern of the plaintiff whether or not the defendants were in a position to pay in full the amounts owing to Citibank and CPF, and the requirement of the plaintiff's solicitors that the defendants' solicitors should produce for their inspection before completion documentary evidence that these creditors would give total discharges on or before the completion is really unnecessarily demanding. All that the plaintiff's solicitors should be concerned with is that on completion the defendants' solicitors should have with them for delivery or procured to be available for delivery total discharges duly executed by these two secured creditors. At the point of time of the completion, the plaintiff's solicitors would be in a position to inspect and ascertain whether the discharges as executed were

satisfactory or otherwise; and if no such discharges were available or if they were not satisfactory, the plaintiff's solicitors would be entitled to refuse, and should refuse, to complete.

As regards the third difficulty, I do not think that the failure of the defendants' solicitors to produce those documents for inspection by the plaintiff's solicitors before completion should prevent the completion from taking place. It is of course a prudent conveyancing practice that a purchaser's solicitor, before the time fixed for completion, should inspect and be satisfied with all the documents which are to be delivered to him on completion. But there is no rule of law that this precaution is mandatory and must be observed. If the vendor's solicitor fails or refuses to produce these documents, the purchaser's solicitor may still proceed with the completion as scheduled, and at the time of the completion if all or some of these documents are not produced or are not satisfactory the purchaser's solicitor would be entitled to refrain from completing the purchase. That precisely is what the plaintiff's solicitors could have done, and should have done, in this case.

Finally, I find that the defendants' solicitors were again in error in insisting that a sum of $16,042.24 be deducted from the purchase price as interest for late completion. The plaintiff's entitlement to such interest is based on cond 8(b), and under that condition, as possession of the property had been given to the plaintiff since 31 October 1986, the amount of interest must be abated by an amount equivalent to the rent calculated on the basis of annual value of the property as determined under the Property Tax Act. No such abatement, however, was given in the account set out in the plaintiff's solicitors' telex of 31 July 1987.

In my opinion, the plaintiff's solicitors' erroneous understanding of the effect of the bankruptcy notice and the multiple requirements imposed by them in their telexes in July 1987, and particularly the telex of 31 July to a large measure contributed to the delay in completing the transaction beyond 31 July 1987. In my view, the plaintiff's solicitors in the circumstances could proceed and should have proceeded to complete or attempt to complete the purchase on 31 July 1987 as fixed by the defendants' solicitors, and if at the point of completion one or more of the documents necessary for completing the transaction were not produced, they could refuse to complete and would be entitled to do so. Further, there is one small, but significant, point which shows that the plaintiff was not ready to complete the transaction on 31 July 1987. Under cond 24 of the Law Society's Conditions of Sale, the conveyance and assignment of the property was to be prepared by the plaintiff's solicitors. A draft of this had been prepared by them, and was subsequently approved and returned to them by the defendants' solicitors on 21 July 1987. That instrument was never engrossed and forwarded to the defendants' solicitors for execution by the defendants in readiness for the completion scheduled to take place on 31 July 1987. That step, clearly, the plaintiff's solicitors must take before the completion, and without the engrossed conveyance and assignment prepared by the plaintiff's solicitors and executed by the defendants the transaction could not possibly be completed. Following 31 July 1987 there was again a long period of delay; first there was a period of silence on the part of both parties stretching over a period of four and a half months; then there was a further period of about three months in which exchanges of lengthy correspondence took place between the plaintiff's solicitors and the defendants' solicitors. For this long period of delay I find that both the plaintiff's solicitors and the defendants' solicitors are to blame.

There is one last point I should mention. I have reviewed the relevant correspondence in exchange between the respective solicitors, and they conveyed to me a distinct impression that the plaintiff or her solicitors at the material time took a rather uncooperative and uncompromising stance in completing the transaction. The reason is clear and obvious. The plaintiff was in an advantageous and comfortable position: she had a binding and enforceable agreement for the purchase of the property; she was given possession of the property since 31 October 1986; until the purchase was completed she was not obliged to pay for any property tax and maintenance fee payable in respect of the property; since 22 May 1987 she had equipped herself with a final order for specific performance and also for damages in lieu of or in addition thereto; the deposit plus interest totalling $17,491.33 was refunded to her on 9 December 1986 or thereabout and she continued to enjoy the benefit of retaining this amount. Since she had not accepted the repudiation of the agreement by the defendants and had obtained an order for specific performance, it must follow that this amount should be returned forthwith and paid to the defendants' solicitors to be held by them as stakeholders as provided in the agreement. She was totally unmindful of this obligation and was certainly not at all minded to return it to the defendants' solicitors notwithstanding repeated requests, whilst at the same time her solicitors maintained an astonishingly untenable stand that she was not in breach of contract.

I now turn to the question whether the plaintiff in the circumstances was guilty of any default within the meaning of cond 8. This turns purely on the construction of the term 'default'. This term has been the subject of numerous decisions in England, and I need not go further than the decision of Parker J in *In re Bayley-Worthington and Cohen's Contracts*[1] where the learned judge reviewed and considered numerous authorities

bearing on the question of 'default' and 'wilful default'. In that case the purchaser took an objection on title which was upheld by Neville J but was subsequently held by the Court of Appeal and the House of Lords to be not well founded. The vendor claimed to be entitled to interest on the remainder of the purchase money and the question before the court was whether the delay in completing the sale arose from any cause other than the neglect or default of the purchaser as provided in the contract. Parker J held that the purchaser in refusing to complete on the ground that the title was bad, though in fact was good, was guilty of default. In the course of his judgment, the learned judge said, at p 656:

> ... Default must, I think, involve either not doing what you ought or doing what you ought not, having regard to your relations with the other parties concerned in the transaction; in other words, it involves the breach of some duty you owe to another or others. It refers to personal conduct and is not the same thing as breach of contract.
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> So, in contracts for the sale of real estate providing for completion at a certain date, and containing provisions as to what is to happen if completion be delayed beyond that date by or without the default, or wilful default, of either party, the conduct of that party has to be considered; and if he has been guilty of no breach of duty he will not, I think, be in default within the meaning of the contract. Of course the duties of each party towards the other must be determined by all the circumstances, including the nature of the contract and its provisions; and in determining these duties the complexities of the English law of real property must be borne in mind.

Later, the learned judge dealt with the question whether taking an objection or requisition which was unsustainable could amount to a default and said at p 657:

> ... If the court decides that an objection or requisition is untenable, it in effect decides that it ought not to have been insisted on, and consequently that the purchaser was in default in refusing to complete till it was complied with or removed. If, on the other hand, the court decides that the requisition or objection was good, it in effect decides that the vendor was in default in not complying with or removing it, if it was in his power so to do. The honest belief of either party in the validity of his own view will not prevent such party being in default, though it may prevent such default being a wilful default within the meaning of the contract in question.

In principle, what Parker J said is clearly applicable here. The plaintiff's solicitors laboured under an erroneous view of the law as to the effect of a bankruptcy notice and also imposed certain requirements to be complied with before completion and such requirements, in my judgment, are unsustainable. The plaintiff was therefore in default in taking such view of the law and in insisting on such requirements. She did what she ought not to have done, and what she did falls squarely within the meaning of the term 'default' as laid down by Parker J. In the case of *Toh Teck Sun* v *Mandarin Gardens Pte Ltd*[2] Chan J held that the plaintiff's counsel took a wrong view of the law as regards the furnishing of a completion account by the vendor and that the plaintiff in refusing to complete the transaction on that ground (based on the wrong view of the law) was guilty of a default. That precisely is also the position here.

In my judgment, the plaintiff must share the blame in not completing the sale and purchase of the property on 31 July 1987 or immediately thereafter. The delay in completing the transaction after 31 July 1987 was not attributable solely to the default of the defendants; it was attributable to the default of both the plaintiff and the defendants. The plaintiff therefore under cond 8(c) is not entitled to interest by way of liquidated damages for the period after 31 July 1987 and on the computation as provided by the defendants' solicitors, which I accept, no amount is payable to the plaintiff by way of liquidated damages. This appeal is allowed with costs and the order of the assistant registrar is set aside. I make no order on the assessment of damages and no order as to costs below.

Appeal allowed.

Solicitors: *Hin Rai & Tan*; *Ang Netto Rama & Wilson.*

Reported by *Terence Tan Bian Chye*

Ng Eng Wah v The Getz Corpn (Singapore) Sdn Bhd & Ors

HIGH COURT (SINGAPORE) – DISTRICT COURT APPEAL NO 63 OF 1987
THEAN J
24 MAY 1989

Civil Procedure – Trial judge's finding of fact – Findings inconsistent with some witnesses' evidence – Whether trial judge ought to make specific findings on witnesses' evidence

The appellant was driving a motor vehicle when it collided with another driven by the deceased. The appellant sustained serious injuries, and later started these proceedings against the respondents (probably the owners of the vehicle driven by the deceased) and the personal representatives of the deceased, claiming damages for negligence. The district judge found that at the time of the accident, the appellant was driving on the wrong side of the road and that his vehicle collided with that of the deceased's. The claim of the appellant was dismissed with costs. The appellant appealed against this judgment on the grounds that in his grounds of decision, the district judge failed to make specific findings as regards the physical evidence of the accident, and that he failed to say whether he accepted the evidence of the appellant or a witness, PW3.

Held, dismissing the appeal:

(1) It was quite apparent and obvious that the judge did not accept the evidence of the appellant and PW3, but accepted the evidence of defence witness DW1.